IN THE

Supreme Court of the United States

Term, 1947. No. 331

RUDY E. CALLEN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

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RUDY E. CALLEN,

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VS.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rudy E. Callen, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on July 28, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania, dated October 21, 1946, is not reported, but may be found in the transcript of the record.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, 161 F. 2d—, dated July 28, 1947, has not yet been printed in the advance sheets, but may be found in the transcript of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on July 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

The Circuit Court set aside a final judgment and granted a new trial on a pure question of law which, if erroneously decided by the Circuit Court, would nullify the new trial and entitle the petitioner here to reinstatement of the judgment obtained in the District Court. This Court in TILLER v. ATLANTIC COASTLINE R. CO., 323 U. S. 574, 65 S. Ct. 421 (1945), granted certiorari in that case in which the exact similar situation existed, where the Circuit Court granted a new trial and set aside a judgment obtained by the employee in the District Court on the ground that an erroneous proposition of law had been submitted to the jury. This Court thereupon held that the proposition of law as stated by the District Court was correct, set aside the grant of a

new trial by the Circuit Court, and reinstated the judgment entered by the District Court.

Certiorari has been held to be appropriate to review an interlocutory decree of a Circuit Court of Appeals where the question of law involved was deemed to be "novel and important" and the position of the petitioner was one which if correct rendered the decision of the Court below wholly void.

AMERICAN CONSTRUCTION CO. v. JACKSONVILLE T. & K. W. RY. CO., 148 U. S. 372 (37 L. Ed. 486).

See also:

SPILLER v. ATCHISON T. & S. F. RY. CO., 253 U. S. 117 (64 L. Ed. 810);

GEORGE A. FULLER CO. v. OTIS ELEVATOR CO., 245 U. S. 489 (62 L. Ed. 422);

U. S. v. GULF REFINING CO., 268 U. S. 542 (69 L. Ed. 1082).

QUESTIONS PRESENTED.

(1) Where, in cases under the Federal Employers' Liability Act, a railroad pleads a release obtained from an injured employee, is the burden of proof upon the railroad to establish its validity, or is the burden on the employee to establish fraud or mutual mistake of fact by clear, unequivocal and convincing evidence?

(2) Did not the Circuit Court of Appeals (3rd Cir.) err in setting aside a judgment obtained by a railroad employee under the Federal Employers' Liability Act, 45 U. S. C. A. 51 *et seq.*, solely on the ground that the trial judge committed error in failing to charge that the employee would be

bound by a nominal release obtained from him by his employer, unless he successfully carried the burden of proof that the release was obtained from him under a mutual mistake of fact, by evidence which was "clear, unequivocal and convincing," especially where the trial court was not asked so to charge, and no exception was taken to his failure so to charge?

CONSTITUTION AND STATUTES INVOLVED.

The Seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers' Liability Act as amended (45 U. S. C. A., Sec. 51, *et seq.*), which provides in part:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Sec. 5 of the Federal Employers' Liability Act (45 U. S. C. A. 55) provides in part:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void. * * *"

STATEMENT OF FACTS.

This is an action under the Federal Employers' Liability Act, 45 U. S. C. A. 51, resulting in a verdict of $24,990.00 for the petitioner. The defenses were that the accident was caused solely by the negligence of the petitioner and that the petitioner had executed a release for $250.00 for all his injuries and pecuniary losses.

The petitioner, Rudy E. Callen, was in the employ of the respondent as a brakeman on December 14, 1944, when he suffered a back injury. He was married and the father of three small children. Petitioner twisted his back when he jumped from the stirrup of a tender, which was being pushed by an engine, and was about to be coupled to some standing cars. Petitioner jumped because the engine was operating at too fast a speed to make the coupling operation safe (19a, 38a, 83a). Negligence was predicated upon that speed and upon the engineer's failure to observe and obey petitioner's signal to slow down (18a, 19a). As a result, petitioner was led to believe that unless he jumped, he might be jolted off by the impact from coupling at the excessive speed, and thereby be thrown under the wheels (19a). While respondent contested this claim of negligence at the trial, there appeared to be no denial on the appeal to the Circuit Court of Appeals (3rd Cir.) that this charge of negligence was sufficiently supported by the evidence.

Shortly after the injury, petitioner went once to his family physician, Dr. Sheets, who taped his back (22a). Thereafter, Callen went to a Dr. Fair, for a series of chiropractic

treatments, which, however, failed to end his pain (22a, 23a). Meanwhile, petitioner had contacted respondent's claim department and he was referred to respondent's claim agent, Veidt, in Toledo, Ohio (24a). At Veidt's request, petitioner took along a statement from the *chiropractor*. This statement was to the effect that petitioner was suffering from "nerve pressure and inflammation" in the lower part of his back and spine. In addition, it carried the rather ambiguous remark that the injury "leaves a weakness which is more readily increased and makes him more susceptible to recurrence." The only treatment mentioned in the statement was "chiropractic adjustments to remove pressure" (274a).

The claim adjuster, Veidt, took petitioner to a Toledo clinic for X-rays (26a). While they were being taken, Veidt waited in the doctor's office (247a). Thereafter, petitioner dressed, and then waited about half an hour for Veidt to rejoin him (138a). Thereupon they returned to Veidt's office (49a).

Although he did not tell Callen whether or not he (Veidt) had received any doctor's report on the X-ray, Veidt upbraided petitioner, telling him that he had a "lot of gall" to complain and that "there is nothing wrong" (26a). Thereupon, although he had pain in his back, because of economic pressure in that his wife was about to have a baby, and he had already lost approximately $500.00 in wages, petitioner agreed to sign a release for $250.00. He did this only in reliance on Veidt's assurance that "there was nothing wrong" and that "he could get back to the job" (27a). At the time, he had no legal counsel.

Veidt admitted that he did not know, when he settled the case, that petitioner was suffering the serious injuries which the doctors described at the trial, that he was not concerned with the injury, but "settled on the basis of no liability" (256a; see also 255a), and that, actually, he had not received any X-ray report at the time of settlement (247a).

After the release, petitioner returned to Dr. Sheets for treatments (30a), continuing up to the time of trial (37a).

He also consulted Dr. Paul N. Jepson, famed Philadelphia orthopaedic specialist (35a). According to Dr. Sheets, petitioner is permanently disabled (128a). Dr. Jepson was uncertain how long petitioner's "chronic" condition would continue (117a), but indicated that petitioner would never have "full one hundred per cent motion in his back—because men with chronic low back strain carry a certain percentage of limited motion, sometimes, throughout their life" (118a).

There was no medical testimony of any kind offered by the respondent to contradict the petitioner's proof that he was permanently disabled.

The respondent did not make any request at the trial that the trial judge charge the jury that the burden of proof in establishing a mutual mistake of fact was upon the petitioner, nor that the petitioner was bound to establish that fact by evidence which was "clear, unequivocal and convincing." It justified the release by asserting that it was based on an accident caused solely by the petitioner's own negligence. That issue was squarely presented to the jury which found against the railroad.

Respondent's motion for a directed verdict was refused and after the verdict for petitioner, respondent's motion for a new trial was denied.

The respondent appealed from the judgment entered in the United States District Court for the Eastern District of Pennsylvania to the Circuit Court of Appeals for the Third Circuit, which reversed the judgment and granted the respondent a new trial on the ground (not raised by the respondent) that it was error for the trial judge to fail to charge the jury that the employee bore the burden of proof of establishing a mutual mistake of fact in the execution of the release, by evidence which was "clear, unequivocal and convincing." The respondent had not requested the trial judge so to charge. It had taken no exception on his failure so to charge. It had not specifically assigned the failure so to charge as error. It had not questioned the failure so to charge in its statement of the questions in-

volved in the appeal to the Circuit Court.

This petition for certiorari to the Circuit Court of Appeals (3rd Cir.) follows, to review the action of that court in setting aside the petitioner's final judgment and granting a new trial on a pure question of law on which, if the court below erred, the petitioner would here be entitled to reinstatement of the judgment.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court erred:

1. In granting the respondent a new trial.

2. In failing to affirm the judgment entered in the United States District Court for the Eastern District of Pennsylvania in favor of the petitioner.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee by trial of jury was violated when a verdict in favor of plaintiff was set aside by the Circuit Court for an alleged omission in the trial Court's charge, which would have been erroneous if given, and, in any event, was not made the subject of a requested point for charge, or of an exception, and was not relied upon by the defendant in the appeal to the Circuit Court.

2. The decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the

decision of the United States Circuit Court of Appeals for the Second Circuit in SCHEER v. ROCKNE MOTORS CORP., 68 F. 2d 942 (1934); STEELE v. ERIE R. CO., 54 F. 2d 688 (1931); and RICKETTS v. P. R. R., 153 F. 2d 757 (1946), more particularly, the concurring opinion of Frank, J.

3. GARRETT v. MOORE-McCORMACK CO., 317 U. S. 239, 63 S. Ct. 246 (1942), expressly held that the burden of proof, establishing the validity of a release for an employee in seamen's cases, was on the employer. In that case, at footnote 17, the Court implied, without deciding, that the same principle should be applied to railroad employees under the Federal Employers' Liability Act. That issue is now directly presented for the first time to this Court for decision.

4. The Court in error applied the local Pennsylvania rule on releases to cases under the Federal Employers' Liability Act which are controlled exclusively by Federal decisional law, and thus held contrary to CHESAPEAKE & O. R. CO. v. KUHN, 284 U. S. 44, 52 S. Ct. 47, 76 L. Ed. 157, and GARRETT v. MOORE-McCORMICK CO., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239.

5. The decision here must be controlled by the Federal common law which has not yet decided this all important issue under the Federal Employers' Liability Act, U. S. A. v. STANDARD OIL CO. OF CAL. and IRA BOONE, 67 S. Ct. 1604 (1947).

CONCLUSION.

The writ should be granted.

Respectfully submitted,

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BRIEF.

ARGUMENT.

I.

THE CIRCUIT COURT ERRED IN REVERSING ON AN ISSUE NOT RAISED IN THE TRIAL COURT AND NOT ARISING ON THE RECORD.

The Circuit Court granted a new trial because the trial judge:

> "* * * failed to tell the jury that clear and convincing evidence of mutual mistake of a material fact was needed in order to set the release aside."

In other words, the position of the Circuit Court was that the trial Court failed to charge that plaintiff had the burden of proof to show mistake by clear and convincing evidence. The Circuit Court then added:

> "Had a point for charge covering this been among the fourteen submitted on behalf of the appellant, it probably would have solved the difficulty, but the failure to suggest such point does not excuse the omission from the charge of the law of that phase of the case which should have been charged of the Court's own omission."

This language of the Circuit Court itself makes it clear beyond peradventure that the defendant below never requested the trial Court to give the charge, omission of which caused the Circuit Court to set aside the verdict of the jury and the judgment in favor of the plaintiff. Defendant failed to ask for that omitted point, notwithstanding the trial judge, after passing upon the points requested by defendant,

pointedly asked, "Now, is there anything more you would like me to say" (293a). Nor was the alleged omission made the subject of an exception. Nor, indeed, was the failure to give that charge relied upon by the defendant itself, even on the appeal, as a ground for reversal.

Assuming, pro arguendo, that the point allegedly omitted would have been correct as a matter of law, it is axiomatic that issues or questions not raised in, or presented to, the trial Court will not be considered in a reviewing court. DE RODRIGUEZ v. VIVONI, 201 U. S. 371, 26 S. Ct. 475 (1906); BECKER STEEL CO. v. CUMMINGS, 296 U. S. 74, 56 S. Ct. 15 (1935), affirming C. C. A., 75 F. 2d 1005, affirming D. C., 10 F. Supp. 343; VIRTUE v. CREAMERY PCKGE. MFG. CO., 227 U. S. 8, 33 S. Ct. 202 (1913).

Error cannot be assigned for failure to give instructions that were not asked. SHUTTE v. THOMPSON, 82 U. S. 151, 15 Wall. 151 (1872); HINDS v. HINCHMAN-RENTON, 165 F. 339 (C. C. A. Colo., 1908); HULL CO. v. MARQUETTE CEMENT MFG. CO., 208 F. 260 (C. C. A. Neb., 1913); McKAY v. MONONGAHELA RY. CO., 44 F. 2d 150 (C. C. A. Pa., 1930); DEL. & H. R. CORP. v. COTTRELL, 69 F. 2d 195, cert. den. 292 U. S. 638, 54 S. Ct. 719 (C. C. A. Pa., 1934); WRATHER v. DEMPSTER MILL MFG. CO., 37 F. 2d 648 (C. C. A. Tex., 1930).

So, too, failure of a trial Court to charge with respect to a particular claim of the defendant is not reviewable unless the matter is called to the attention of the trial Court. CLEVELAND & WESTERN COAL CO. v. MAIN ISLAND CREEK COAL CO., 297 F. 60, cert. den. 265 U. S. 588, 44 S. Ct. 634 (C. C. A. Ohio, 1924). Likewise, it has been held in a Federal Employers' Liability case that in the absence of a request for a charge as to the effect even of as an important a matter as voluntary assumption of risk, such a question cannot arise on the record. SOUTHERN RY. v. GADD, 233 U. S. 572, 34 S. Ct. 696 (1914). Similiter as to failure to give instructions as to the statute of limitations, DEXTER v. HALL, 82 U. S. 9, 15 Wall. 9 (1872).

Indeed, it has long been settled that the failure to instruct on a particular point—*no matter how material*—cannot be assigned for error unless the trial judge's attention was called to it with a request for instructions. MUTUAL LIFE INS. CO. v. SNYDER, 93 U. S. 393, L. Ed. 887 (1876); HERMAN CHEMICAL CO. v. BURLINGTON INDUST. ALCOHOL CO., 9 F. 2d 289 (C. C. A. N. J., 1925); STATE AUTO. MUT. INS. CO. v. YORK, 104 F. 2d 730, cert. den. 60 S. Ct. 120. (C. C. A. N. C., 1939); KEYSTONE COAL & COKE CO. v. FEKETE, 232 F. 72, cert. den. 242 U. S. 18, 37 S. Ct. 18 (1916); OHMER v. ALLEN, 79 F. 2d 942 (C. C. A. Ohio, 1936). The principle of the above cases has been applied even where the complaining party supposes that the instructions are indefinite, ambiguous or not sufficiently comprehensive. In any event, in the absence of a request for further explicit instructions, reversal may not be had for such supposed error. Case of TWEED, 83 U. S. 504, 16 Wall. 504 (1872); ATLANTIC COASTLINE RY. CO. v. FORD, 287 U. S. 502, 53 S. Ct. 249 (1933); WASH. & G. R. CO. v. VARNELL, 98 U. S. 479, 25 L. Ed. 233 (1878). In short, even the possibility that an instruction might be misunderstood by a jury, is not ground for reversal where the matter is not called to the attention of the trial court. GRAHAM v. U. S., 231 U. S. 474, 34 S. Ct. 148 (1913).

And even where the trial Court overlooks giving a point that has been specifically requested, if the Court invited counsel to suggest any omissions, and none were suggested, a general exception to the refusal to charge as requested will not suffice to raise the error on appeal. P. R. R. v. MINDS, 250 U. S. 368, 39 S. Ct. 531 (1919). In that case, the Court said (at p. 375):

> "Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial Court had its attention been seasonably called to the matter."

Since in the instant case, defendant failed to request the point suggested by the Circuit Court, even after being invited by the Court to advance further points, failed to take exception to the omission, and failed to rely upon that omission on appeal, the Circuit Court erred in reversing on that ground. Thereby, the Circuit Court deprived plaintiff of the fruits of his constitutionally guaranteed jury trial.

II.

THE POINT ALLEGEDLY OMITTED FROM THE CHARGE WOULD HAVE BEEN ERRONEOUS IF GIVEN.

The learned trial judge properly told the jury the following:

(a) whether the injuries were temporary or permanent, and the disability, if any, was partial or entire, were solely questions for the jury;

(b) neither party knew of or settled this case in contemplation of serious permanent injuries;

(c) the release, therefore, had no effect to bind the petitioner for such injuries *unless* he executed the release, not on the basis of the injuries and losses involved, but rather *despite* such injuries, and because his own conduct was the sole cause of the accident.

The Circuit Court conceded that there was adequate evidence of mistake to justify setting aside the release. It said: "There was thus in the trial some evidence of mutual mistake regarding Callen's injuries, an important element in the settlement." But it reversed the judgment below on the theory that the plaintiff's "evidence in order to void the release, had to be clear, unequivocal, and convincing." At the same time, the Circuit Court recognized the existence of the

jury issue and admitted that had the trial judge, in his charge, added those three magic adjectives as the standard and told the jury that the petitioner bore that burden of proof, there would have been no error. Furthermore, the Circuit Court acknowledged that a request *by the defendant* for such a charge would have avoided error.

It follows that, since admittedly there was adequate evidence of a mutual mistake of fact, if, as a matter of law, there is no such burden of proof upon the railroad employee, failure so to charge was not error and the Circuit Court's assigned reason for setting aside the judgment falls, so that the original judgment should be here reinstated.

Who then bears the burden in releases executed by employees in cases under the Federal Employers' Liability Act? The railroad or the employee? And by quantum of proof?

This question has never been directly decided by this Court. It is novel, it is most important, and the decision in *this* case will be of the greatest significance in assuring the prime purpose of the statute itself, i. e., proper and fair compensation to railroad employees for injuries sustained in interstate commerce, in accordance with the measure of damages set forth in the statute. This Court found the very same issue *in seamen's cases* to be of sufficient significance to grant certiorari in GARRETT v. MOORE-McCORMACK CO., 316 U. S. 239, 63 S. Ct. 246 (1942), indicating the law on releases as to both is comparable, without expressly deciding it and reserved the question in railroad cases for future decision. It is here, now, for the first time, directly presented to the Court.

Does not the rule enunciated for seamen in GARRETT v. MOORE-McCORMACK CO., supra, apply equally to railroad workers?

We are, of course, bound by Federal decisional law on this question. BAILEY v. CENTRAL VT. R. CO., 63 S. Ct. 1062, 319 U. S. 350, 87 L. Ed. 1444 (1943). We must look then for our authorities and our reasoning, in deciding this question, to the following:

A. The Federal common law "to be gathered from the same * * *" sources employed by Federal courts prior to the decision in ERIE R. CO. v. TOMPKINS, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); (L. Hand, J., in RICKETTS v. P. R. R., 153 F. 2d 757, 759.)

B. To the statute itself, creating the right of action.

C. To other Federal statutes creating similar rights for other classes of employees, as the Jones Act, 46 U. S. C. A. 688, and the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A., Sections 915 and 916.

A. The Federal common law and those sources employed by Federal courts prior to the decision in ERIE R. CO. v. TOMPKINS, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The recent case of U. S. A. v. STANDARD OIL CO. OF CAL. and IRA BOONE, 67 S. Ct. 1604 (1947), held that there is a definite field of Federal common law. This exists, naturally, where suits are based on Federal statutes, on subjects about which the Federal courts alone must establish the substantive law.

In effect the law of releases, as decided under the GARRETT v. MOORE-McCORMACK CO. case, supra, was an enunciation of the Federal common law, as it applied to seamen. The Court took a viewpoint diametrically opposed to that expressed by the Pennsylvania Supreme Court as Pennsylvania common law and placed the burden of proof on the employer to justify employee releases.

What is the Federal common law on releases? This Court in the GARRETT case, supra, clearly indicated that cases under the Federal Employers' Liability Act (non-maritime tort actions) are comparable to seamen's suits. The cases cited in footnote 17 of that case all sustained judgments for the injured employee and held the releases properly set aside. None placed the burden of proof on the injured to invalidate the release, and none set up the severe and

strained standard of proof suggested by CHICAGO & N. W. R. CO. v. WILCOX, 116 F. 913, 914 (C. C. A. 8, 1902), upon which the Court below here relied.

There was some conflict between the various Federal courts as to the burden of proof on releases in ordinary tort actions, but none in Federal Employers' Liability Act cases until this decision. The Court below relied on the WILCOX case, supra, where by a *divided* court, it was held that, "* * * A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is *clear, unequivocal and convincing.*" (Emphasis supplied.)

That was a simple tort case, not involving a master-servant relationship and was not an action under a Federal statute, written as was the Federal Employers' Liability Act to give the widest possible protection to injured railroad employees. LILLY v. GRAND TRUNK WESTERN R. CO., 317 U. S. 481, 485, 63 S. Ct. 347 (1943); GREAT NORTHERN R. CO. v. DONALDSON, 246 U. S. 121, 38 S. Ct. 230 (1917).

The WILCOX case is more revered for its antiquity than its authoritativeness or scholariness. In employee suits against railroads prior to the Federal Employers' Liability Act and since the passage of that Act, most courts have not followed the decision of the WILCOX case. Some have expressly preferred the dissenting opinion of Judge Thayer in that case. Even the few who seemingly cited the WILCOX case with approval managed to set aside the releases by distinguishing it or by holding the evidence adequate to meet the WILCOX test. LION OIL REF. CO. v. ALBRITTON, 21 F. 2d 280 (1927).

Thus, in STEELE v. ERIE R. R., 54 F. 2d 688, affirmed 54 F. 2d 690 (C. C. A. 2, 1931), a Federal Employers' Liability Act case, the WILCOX rule was rejected.

The case of TEXAS & PAC. RY. CO. v. DASHIELL, 198 U. S. 521, 25 S. Ct. 521 (1905), is on "all fours" with the instant case.

Even in an ordinary tort suit, SCHEER v. ROCKNE MO-

TORS CORP., 68 F. 2d 942, 945 (C. C. A. 2, 1934), Judge L. Hand said, "These assurances were much more positive than that before the Court in Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913 (C. C. A. 8). *The dicta of the majority we have already refused to follow, preferring Judge Thayer's dissent.*" (Emphasis supplied.)

Perhaps no more learned and exhaustive review of the whole subject can be obtained any place than in the opinion of Judge Frank in RICKETTS v. P. R. R., 153 F. 2d 757 (C. C. A. 2, 1946). He analyzed and reviewed the works of all the writers on the subject, including Williston, Wigmore and the Restatements of Contracts and Restitution, the various real and fictional approaches to the problem, the values that inured in all of them, and the practical aspects of each. He recognized the fact that railroad employees in this phase of their employment are individuals at the mercy of the railroad company, who need protection from hard and unconscionable bargain-driving by the employer. This was in *pari materia* with the underlying social and economic values expressed in the celebrated opinion of Judge Story in HARDEN v. GORDON, Federal Cases No. 8047, at pages 480, 485.

Judge Frank concluded that the burden of establishing the validity of a release should be on the railroad and not at all on the employee and drew the appropriate analogy to seamen's cases.

He said the following, at page 768:

> "* * * *As already noted, the Supreme Court recently gave a broad hint that the admiralty doctrine is not as exceptional as is sometimes supposed;* see Garrett v. Moore-McCormack Co., 317 U. S. 239, 248, 63 S. Ct. 246, 87 L. Ed. 239; note 17. For reasons previously indicated, I think we should take that hint. It seems to me that the time has come to give up the elaboration of distinctions found in the judicial opinions relieving non-admiralty employees of their releases. *I believe that the courts should now say forthrightly that the ju-*

diciary regards the ordinary employee as one who needs and will receive the special protection of the courts when, for a small consideration, he has given a release after an injury. As Mr. Justice Holmes often urged, when an important issue of social policy arises, it should be candidly; not evasively, articulated. *In other contexts, the courts have openly acknowledged that the economic inequality between the ordinary employer and the ordinary indvidual employee usually means the absence of 'free bargaining.' I think the courts should do so in these employee release cases. And the federal courts, I think, should so hold in respect to liability pursuant to the Federal Employers' Liability Act. I think, therefore, that we should treat the plaintiff here as we would if he were a seaman."* (Emphasis supplied.)

Today, in most enlightened jurisdictions, there need not even be a *mutual* mistake of fact as to the injury. It is sufficient if there is a bona fide unilateral mistake as to the nature and extent of the injury. In the very recent case of SULLIVAN v. ELGIN J. & E. R. CO., 73 N. E. 2d 632 (Ill., 1947), it was held that the release of an employer from future liability for past injuries sustained by the employee is void unless based upon valuable consideration and that the release, in that case, executed by the employee without knowledge as to the seriousness of his injury, would be set aside, whether or not the employer was aware at the time that the employee had suffered serious brain injury, as a mistake of fact need not be mutual.

B. The Federal Employers' Liability Act seemingly would place the burden on the employer to sustain a release.

The Federal Employers' Liability Act itself is an act written for the purpose of giving protection, long needed, to railroad employees injured in interstate commerce. That Act must be liberally interpreted. LILLY v. GRAND

TRUNK WESTERN R. CO., supra, and GREAT NORTHERN R. CO. v. DONALDSON, supra.

Section 5 of the Act reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereon on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66."

The prior experience in states where the legislatures had passed Employers' Liability statutes for railroad employees had been one of numerous and devious devices to avoid the statutes. See DUNCAN v. THOMPSON, 315 U. S. 1, 6, 62 S. Ct. 422 (1942). These devices actually deprived the employees in many instances of all the protection intended by the state employee acts. Congress in 1908 amended the original Act of 1906 in such manner as to make the present protective paragraph, Section 5, all-comprehensive so that every kind of contract or agreement would be held void which had the effect of depriving the employee of full and adequate remuneration for injuries compensable by the other paragraphs of the statute.

All activities pertaining to injuries under this Act must be screened through Section 5. Thus, the employee was held entitled to the benefits of the Act where he was hired by an alleged independent contractor to do railroad work (ERIE R. CO. v. MARGUE, 23 F. 2d 665 [C. C. A. 6, 1928]); or executed an agreement not to sue until he had refunded $600.00 advanced as living expenses (DUNCAN v. THOMPSON, supra); or had executed an agreement not to sue in

the district in which the suit was actually filed (SHERMAN v. PERE MARQUETTE R. R., 62 F. S. 590 [D. C. Ill., 1945]). All of the attempts at restrictions on the right to proceed with an action under the Federal Employers' Liability Act in these instances were held invalid. Furthermore, in the DUNCAN case, supra, it was held that Section 5 of the Act applied, notwithstanding the fact that the alleged agreement was entered into after the injury had occurred, the Court holding that there was no basis for distinguishing, as some courts had previously done, between agreements which were executed prior to the injury and those which were executed after the injury.

Can there be any device that more definitely is intended to, and does, enable a railroad to escape its responsibility under this statute, than a nominal release, the amount of which admittedly could not possibly have been meant to compensate for the actual injuries involved? Must not then those who seek by any means, including releases, to prevent action under the Act meet the test of Section 5? Is not that the expressed Congressional intention? We respectfully submit that Congress wrote this section as broadly as possible in order to prevent any device, *including releases*, however ingeniously conceived or explained, from stultifying the broad purposes of this humanitarian legislation.

C. Congress has indicated a similar intention to place the onus of sustaining a release on the employer in other industries.

Congress has already legislated on seamen's releases in regard to wages, and requires the execution of such releases in the presence of a Shipping Commissioner and even then "on good cause" any court having jurisdiction may set aside the release and take such action as justice shall require. 46 U. S. C. A., Sec. 597.

Indeed, even as to longshoremen whose conditions of employment are even more comparable to railroad employees,

Congress wrote into Sections 915 and 916 of the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A., strict requirements as to releases which, if in the slightest deviated from, rendered the releases void.

Even in Pennsylvania, where the petitioner here was hired, in Workmen's Compensation matters, agreements for compensation are ineffective until approved by the Pennsylvania Workmen's Compensation Board: Act of 1915, P. L. 736, Sec. 409, amended 1939, P. L. 520, 77 P. S. 733.

What then of nominal releases? Here a jury assessed the value of the case at over $25,000.00. The Company obtained a release of $250.00, or 1% of what twelve intelligent citizens of the community, sitting as jurors, assessed its true value. A learned, experienced and humane trial judge refused to cut that verdict. He believed the amount of the verdict just and fair. His decision therein was final and not subject to review. SCOTT v. BALTIMORE & O. R., 151 F. 2d 61 (C. C. A. 3, 1945).

Should not the burden of sustaining this release be on its proponent? The wise and bitter denunciation, expressed by Judge Frank in the last paragraph of his concurring opinion in the RICKETTS case, supra, of the railroad there involved, which is the same railroad here involved, where it there attempted to escape a $7500.00 liability by a payment of $750.00, may be here repeated tenfold with profit. He said, at page 770:

> "One need not be highly imaginative or unduly cynical to surmise that the Pennsylvania Railroad, in seeking here to be rid of a liability of $7,500 to this employee for a payment of $750, is not too strongly motivated by a philanthropic regard for its other employees."

III. GENERAL DISCUSSION.

Some passing criticism was leveled below at the trial judge for his comment as to the permanency of the injuries. He did not rule as a matter of law that the petitioner had permanent injuries. He repeatedly left to the jury the question of whether there were any injuries at all, whether partial or permanent. What is more, the respondent offered no medical testimony to contradict that offered by the petitioner. Four times the learned trial judge expressly left the extent, if any, of the injuries to the jury. Thus, the record is as follows:

> "Now, you heard the doctor's testimony as to his injuries. I am going to leave you to pass judgment upon how far this man is impaired, whether partially impaired, whether partially impaired permanently, or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you. * * * I am going to leave you to say in your experienced judgment just how far he has been impaired" (page 282a).

Again (at 289a), he said:

> "I don't know what evidence there is, I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. * * * If he believed and he knew full well he was injured the way he is today and he made a settlement for $250.00, then he would be bound by it."

What is more, on having his attention directed to the same question by counsel for respondent, the Court said, for the third time, at page 295a, the following:

"THE COURT: I certainly didn't intend to give the implication that you get from it. I am leaving this entirely up to the jury to say whether he was injured, whether partially, temporarily, or what. The question of whether he was injured in any way at all as a result of this accident is entirely for the jury. Can I make that any plainer? The plaintiff claims now that he was seriously injured, and that is what I am trying to bring out, but that is entirely for you, members of the jury."

Then once more (at 296a), the Court repeated that whether the parties had permanent injuries in mind was "up to the jury."

Further criticism was made by the Circuit Court of the Charge:

"The release * * * I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured and settled for $250.00 the comment of the Court might be entirely different."

This was absolutely correct as far as it went and at the point rendered. It is exactly the point raised in TEXAS PAC. RY. CO. v. DASHIELL, supra, where the Court also held as a matter of law that the release was not binding. Here, admittedly, the claim agent did not know at the time of the execution of the release that the petitioner suffered the injury complained of at the trial (255a, 256a). Admittedly, he did not settle the case on those injuries (255a, 256a). His defense of the release was that he settled the case without regard to the injuries at all and on the theory of no liability (255a, 256a). He paid only a part of the lost wages as an expression of the railroad's paternalistic benevolence. The petitioner said he settled, not on the basis of the present injuries, but in reliance upon the claim agent's

report that he had no injuries at all and could return to work (27a).

Neither side claimed that the case was settled on the basis of a permanent injury because no one knew he had it. Therefore, the Charge as to permanent injury was absolutely correct. The railroad's contention that the injury was not the issue, but that there was no liability was fairly presented to the jury by the affirmance of defendant's request for charge No. 7, which read:

> "If you believe that the execution of the release was based partly if not entirely upon the question of liability and not upon any representations as to the extent of the injury, the release is binding upon the plaintiff and your verdict must be for the defendant."

And, further, the Court affirmed defendant's request for charge No. 6 and made the following comment

> "If you believe that at the time the Plaintiff executed the release he had been advised by his own doctor that he had not been cured and that further treatments would be required, in that event the Plaintiff was not misled by anything done by the Defendant and you must accordingly find that the release is binding and valid and your verdict must be for Defendant.
>
> Members of the jury, I affirm that point with this explanation, if you believe that at the time the plaintiff executed the release he had been advised by his own doctor that he had not been cured and that he believed he had not been cured—I don't know what evidence there is, I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. But, he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured, and they both settled on the basis of loss of wages and expenses and because Mr. Veidt felt there

was no liability and that it was just a local matter. * * *"

At the time of the execution of this release, the railroad either knew this employee had these injuries or it did not know that he had these injuries. If it did not know that he had these injuries, it was obviously a mistake of fact and the release should be set aside. If it did know that he had these injuries, but told him that he did not have them, then it was guilty of gross fraud and the release should be set aside. The Court then properly said, at page 282a,

"* * * and if they did know he was permanently injured and settled for $250.00, the comment of the Court might be entirely different."

The comment explains itself.

CONCLUSION.

The Circuit Court in its opinion specifically admitted that had the trial judge charged that the employee bore the burden of proof of mutual mistake of fact by clear, unequivocal, and convincing evidence, there would have been no error, and that the verdict would have to be sustained. This raises a pure question of law. If the Circuit Court was in error in this regard, then the judgment must be reinstated. Even if we assume, *pro arguendo*, that the trial judge was in error in not so charging, was it reversible error to fail so to charge in the absence of a request for such charge, especially where, admittedly, there was evidence produced by the employee of a quality sufficient to meet even that burden of proof and the trial judge had asked if defendant wished further instructions (293a)? What is more, could the Circuit Court, of its own motion, consider a question of law raised for the first time at a point much beyond the time allowed by parts (a) and (d) of Rule 59 of the Federal Rules of Civil Procedure?

The question the Circuit Court decided the case on was never argued before it. The basic ground relied upon by the railroad was summarized in the railroad's own brief at page 10. One can readily see that it never even considered this alleged error. Thus, the brief reads:

> "Accordingly, the inquiry is directed *solely* to the question of whether or not there was evidence of a mutual mistake of fact and whether or not the trial judge erred in removing this question from the jury's consideration." (Emphasis supplied.)

Compare MARSHALL'S U. S. AUTO SUPPLY, INC. v. CASHMAN, 111 F. 2d 140, 142 (C. C. A. 10), cert. den. 311 U. S. 677 (1940), point 9 of syllabus; JOHNSON v. JOSEPH SCHLITZ'S BREWERY CO., 33 F. S. 176, 182 (E. D. Tenn., 1940); and FREID v. McGRATH, 133 F. 2d 350 (C. C. A. D. C., 1942).

We submit that the problem here involved is one of the gravest importance to railroad employees throughout the United States. After the execution of a nominal release, seemingly trivial injuries often prove serious and permanently disabling. Individual employees of meager education, with a limited knowledge of the law or not at all, are "squared off" against trained claim agents. The failure to place the burden in the proper place in this class of cases will undoubtedly result, as it has many times over in the past, in great suffering and misery in thousands of American railroad households where the breadwinner has been the subject of an outrageous release, such as here extracted from this employee under the weight of economic pressure. The loss of but a few weeks' wages in the average workingman's home places the employee under such pressure that he becomes an easy victim for the small, but tempting amount of cash offered by a claim agent who assures him that his injury is trivial and temporary.

Congress has shown its intention by this Act to protect the employee. We believe this to be the only reasonable

interpretation that should be made of the Act and the only effectual manner in which it can be done is by placing the burden where it belongs by reasons of justice and humaneness,—on the employer.

In this case the Court will here write a new chapter of Federal common law. The doctrine followed by the Court below is part of the school of thought that championed *laissez-faire* and *caveat emptor* in the 18th Century. Today the most conservative and reactionary of economic thinkers do not, at least publicly, espouse such thinking. It is certainly alien when applied to liberal and humanitarian legislation such as the Federal Employers' Liability Act.

Respectfully submitted,

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